

Service Date: November 19, 1990

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application)	TRANSPORTATION DIVISION
for transfer of Montana Intrastate)	DOCKET NO. T-9558
Certificates of Public Convenience)	DOCKET NO. T-9559
and Necessity, PSC No. 1364 and)	DOCKET NO. T-9560
PSC No. 3353.)	ORDER NO. 6013

FINAL ORDER

APPEARANCES

FOR THE APPLICANTS:

Craig D. Martinson, Attorney/Trustee, Veeder and Broeder, P.C., P.O. Box 1115, Billings, Montana 59103-1115, appearing on behalf of Bankruptcy Estate of H.F. Johnson, Inc. and Rocky Mountain Feed Ingredients Service, Inc., Transferors

Charles A. Murray, Jr., 2812 First Avenue North, Suite 210, Billings, Montana 59101, appearing on behalf of Sorlie Trucking, Inc. and S-B Transportation, Inc., Transferees

FOR THE PROTESTANTS:

C.W. Leaphart, Jr., 1 North Last Chance Gulch, #6, Helena, Montana 59601, appearing on behalf of Hornoi Transport, Inc.

William P. Driscoll, 301 1st National Bank Building, P.O. Box 1715, Helena, Montana 59624, appearing on behalf of Big Z, Inc.

FOR THE COMMISSION:

Denise Peterson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

HOWARD L. ELLIS, Commissioner and Presiding Officer
JOHN B. DRISCOLL, Commissioner
REX MANUEL, Commissioner

BACKGROUND

On May 17, 1990 H.F. Johnson, Inc., and Rocky Mountain Feed Ingredients Service, Inc., of Billings, Montana filed three applications to transfer portions of PSC Certificate No. 1364 to S-B Transportation, Inc. (T-9559) and Sorlie Trucking, Inc. d/b/a Sorlie Trucking (T-9558) and PSC Certificate No. 3353 to S-B Transportation, Inc. (T-9560). These applications were jointly filed by Craig D. Martinson, attorney at law and trustee for the bankruptcy estates of H.F. Johnson, Inc., and Rocky Mountain Feed Ingredients Service, Inc. and by Charles A. Murray, Jr., attorney for the Applicant transferee purchasers from the estates.

H.F. Johnson, Inc. and Rocky Mountain Feed Ingredients, Inc. are separate corporations of H.F. Johnson, P.O. Box 1435, Billings, Montana 59103-1435, filing separate bankruptcy actions in the United States Bankruptcy Court for the District of Montana, Case Nos. 90-1436-7 and 90-1437-7, respectively.

Sorlie Trucking, Inc. d/b/a Sorlie Trucking and S-B Transportation, Inc., Billings, Montana, are separate corporations with the same officers: Lynn D. Sorlie, President, William Bernhagen, Vice President and Elizabeth A. Sorlie, Secretary/Treasurer.

Following due notice of the applications for sale and transfer of the operating authorities, Hornoi Transport, Inc. (Hornoi) of Laurel, Montana filed protests in all three dockets on

June 25, 1990. Hornoi alleged that fitness of the transferee and the sale of duplicating operating authority may be at issue in Docket Nos. T-9558 and T-9559, and in addition, common control may also be at issue in Docket No. T-9560.

Big Z, Inc., Billings, Montana, filed protests to Docket Nos. T-9558 and T-9559 on June 28, 1990, protesting the transfer of authority on the bases that Sorlie Trucking, Inc. and S-B Transportation, Inc. are unfit to transport the commodities in the application, that the vehicles are unsafe and that they do not have the financial resources to improve the safety of the vehicles, equipment and operations. Big Z, Inc. did not protest Docket No. T-9560.

Following due notice, the Commission held a public hearing on October 25, 1990 at 1:00 p.m. in its conference room at 2701 Prospect Avenue, Helena, Montana. The purpose of the hearing, pursuant to notice, was to take testimony on the issue of fitness of the Applicants.

Prior to testimony, Craig D. Martinson, trustee for the bankruptcy estates, and Charles A. Murray, attorney for the proposed transferees, moved the Commission to grant a withdrawal of the application in Docket No. T-9558. This authority under PSC No. 1364 was for liquified petroleum gas in bulk between Billings, Montana and points and places in the State of Montana. Applicants also moved to amend the application for transfer of PSC No. 3353 in Docket No. T-9560 as follows: that portion of Class B authority for petroleum products to all points in Montana within a radius of 350 miles of refineries in Glacier and Cascade Counties will be returned to the bankruptcy estate of Rocky Mountain Feed Ingredients Service, Inc. The removal of these authorities from the applications for transfer resolved the question of duplicating authority.

Conditioned upon resolution of the issue of duplicating a petroleum authority, C.W. Leaphart, representing Horno Transport, Inc. (See No. 7, above), withdrew objections to the application in Docket No. T-9559.

The Commission granted Applicants' motions to withdraw the application in Docket No. T-9558 and to amend the application for transfer to delete the petroleum authority in Docket No. T-9560. Applicants' attorneys agreed to submit written motions to withdraw in Docket No. T-9558 and to amend in Docket No. T-9560 in conformity with the oral motions. These motions were submitted November 1, 1990.

With the consent and agreement of parties, the Commission proceeded to hear testimony related to Docket No. T-9559 only. Protestant Big Z, Inc. had not protested Docket No. T-9560 and Horno Transport, Inc. had no objection to the transfer of remaining authority to haul beet molasses and liquid animal feed in Docket No. T-9560.

SUMMARY OF TESTIMONY

Testimony of Applicant

Craig Martinson appeared on behalf of the transferors, as trustee for the bankruptcy estates of H.F. Johnson, Inc. and Rocky Mountain Feed Ingredients Service, Inc. As attorney and trustee for the proposed transferors, he argued in favor of the transfer and supported the application, satisfied with the performance of applicant transferees under their lease from the bankruptcy estate.

Lynn Sorlie, president and 50 percent owner of S-B Transportation, Inc. and William Bernhagen, Vice President and owner of the other 50 percent, appeared and testified on behalf of the application. Both reside in Billings, Montana.

Lynn Sorlie testified that he has been in the trucking business since 1975. From 1975-1980 he transported livestock and lumber. He went to work for H.F. Johnson, Inc. in 1980 and has hauled petroleum products since. He testified that he is experienced in hauling asphalt, petroleum and products, propane gas, as well as lumber and grain products.

According to Mr. Sorlie's testimony, since March, 1990, S-B Transportation, Inc. (S-B) and Sorlie Trucking, Inc. have leased the authorities subject to these applications from the bankruptcy estates of H.F. Johnson, Inc. and Rocky Mountain Feed Service Ingredients, Inc. The companies acquired the physical plant and equipment of H.F. Johnson from the bankruptcy estate. The plant includes a three bay building with offices and 4 1/2 acres. Mr. Sorlie submitted as Exhibit A-1 a list of equipment acquired from H.F. Johnson, as well as leased units. Exhibit A-1 includes equipment owned and leased by Sorlie Trucking, Inc., also available to S-B Transportation, Inc., according to testimony.

Mr. Sorlie testified that S-B advertises in the yellow pages in Bozeman, Billings, Great Falls, Montana and Bismarck, North Dakota, with a 1-800 number. S-B also advertises through brochures.

Mr. Sorlie testified that H.F. Johnson's equipment which needed repairs were stripped to the barrel, repaired, insulated and retinned. The equipment has successfully passed examination at weigh stations. S-B has never had a red tag. He testified that S-B is willing and financially able to acquire additional equipment to meet public convenience and necessity, as required.

Mr. Sorlie testified that the company has a Policy and Safety Manual submitted as Exhibit A-2. This manual complies with requirements of the United States Department of Transportation (DOT), he testified.

Under cross-examination, Mr. Sorlie testified that he had a high school education. He had worked since November, 1980 as an employee of H.F. Johnson. He was a "lessor" until 1984, when he became a salesman. He overlooked the shop when H.F. Johnson was in Chapter 11 (reorganization) bankruptcy. When reorganization failed and H.F. Johnson went into Chapter 7 (liquidation) bankruptcy, he and Will Bernhagen incorporated as equal shareholders in S-B Transportation, Inc. and Sorlie Trucking, Inc.

Both are actively involved in day-to-day operations, according to testimony. Mr. Sorlie does the sales work, overlooks the shop and dispatches. Mr. Bernhagen does the financial reports and overlooks the shop in Mr. Sorlie's absence. Mr. Sorlie testified that his personal financial investment was minimal. His contribution was his knowledge of the existing business. Mr. Bernhagen's contribution was about \$150,000 for the operating authority and \$70-80,000 for the equipment from the estate of H.F. Johnson. S-B owns three tractors and numerous trailers per Exhibit A-1 and has acquired an additional set of propane trailers within 30 days (not on list). S-B has leased the authority since March 23, 1990 when H.F. Johnson ceased operations. S-B has had no debt to start up, and has paid repair costs from operations. S-B employs three drivers and leases units from owner-operators not in direct employment. The company receives 25 percent and the lessors 75 percent under the lease arrangement. All the lease drivers have received approval under S-B's liability insurance, Mr. Sorlie testified. Lessors operate under S-B authority, charge and get fuel through S-B.

Under further cross-examination, Mr. Sorlie testified that there was one incident when there was a leak and about 40 gallons of coke spilled. No EPA report was necessary, since it occurred in an enclosed place, was immediately cleaned up and did not contaminate. To other questioning, Mr. Sorlie responded that S-B like others in the industry uses the same trailers to haul asphalt and petroleum products. S-B uses standard industry practices, such as using a heater to dissipate water or motor oil to clean and suck back out. All three S-B tractors are self-unloading and have pumps. At the peak of the season S-B has 22 asphalt lease units. All are required to comply with S-B's safety policy manual.

Mr. Sorlie also testified, under cross, that within the last 30 days S-B had hired a lessor driver, Steve Eva. Mr. Sorlie has gone through his safety records and personally seen him on the premises.

Mr. Sorlie testified that S-B was having a safety meeting with Montana Motor Carriers which would work with the insurance company and conduct further safety discussions. S-B expects to get a better handle on equipment and maintenance records. Under redirect examination, Mr. Sorlie testified that in his employment at H.F. Johnson he was under the direction and control of the owners.

William Bernhagen, vice-president and 50 percent owner of S-B Transportation, Inc., testified that he is the officer manager and fills in with dispatching. He is primarily responsible for the financial operation. He sponsored Exhibit A-3, a balance sheet compiled by an employee at his direction. The balance sheet shows S-B to have \$705,128.11 in total assets and \$240,525.21 in total liabilities. Total capital is \$464,602.90, including \$420,185.15 in common stock and \$44,417.75

in retained earnings. The balance sheet was prepared for the period ending August 21, 1990. Mr. Bernhagen testified that the purchase price on its face was \$185,000.

Mr. Bernhagen sponsored Exhibit A-4, an Income Statement for a five month period, April 1 - August 31, 1990. The statement shows Total Income of \$690,212.27, Total Expenses of \$643,869.82 and Gross Profit and Operation Income of \$46,342.45. With other income of \$7,299.17 and other expenses of \$9,223.87, S-B showed a net income of \$44,417.75. Expenses for the five months include salary expense of \$59,009.61 for the six employees, \$592,851.43 in lease revenue expense with a credit of \$111,437.39 for S-B's 25 percent share from the lease arrangements, among other operating expenses.

Mr. Bernhagen testified that S-B had enough funds to repair and maintain the existing equipment and to acquire additional equipment from revenues, as needed.

According to testimony under cross-examination, Mr. Bernhagen works 14 hour days, about half his time devoted to S-B and half to Sendac Leasing. He has worked for Sendac since 1979. He has a college degree in business education and economics, but is not a CPA. At Sendac, he is lease manager, responsible for buying and selling equipment, leasing, collection and everything else.

Mr. Bernhagen testified that S-B has taken equipment used on the road and torn up, repaired, replaced parts, reinsulated and/or retinned, as needed. This repair was on 6 trailers out of approximately 39 on Exhibit A-1.

Under further cross-examination, Mr. Bernhagen testified that there was no debt in the capital purchase. S-B, following discussion with and approval of Workers' Compensation, does not withhold from payroll of lessors. They have signed a form stating they are independent

contractors responsible for their own workers' compensation coverage. S-B's direct employees, of course, are covered and subject to withholding. S-B has six employees, four in Billings and two in Bozeman.

Testimony of Protestant

Les Keebler, vice president and minority stockholder of Big Z, Inc. appeared and testified on behalf of Big Z, Inc. He received a B.S. in civil engineering from Montana State University in 1975, and has some post-graduate credits. For eight years after graduation he worked for a highway contractor in petroleum and asphalt. He then worked for Cenex as an asphalt sales engineer, making asphalt terminals, redesigning, engineering and constructing new facilities and marketing new products in the northwest.

According to testimony, in 1988 Mr. Keebler joined Big Z, Inc., a family business, and became a shareholder and full-time employee. He is also a consulting engineer on the side, doing weekend work. He is a sales manager and market analyst, devoted to creating a battle plan on marketing, supply and demand. He does not drive trucks, in fact had scarcely even been behind the wheel of a truck.

Mr. Keebler testified that Big Z, Inc. owns 11 tractor units and employs 15-17 drivers. In reviewing the equipment list, Exhibit A-1, it was his opinion that S-B's average fleet age of 1962 (sic) was old compared to Big Z's average fleet age of 1984 (sic). An objection to this line of questioning was sustained. Mr. Keebler then testified as to concerns about S-B's operating with lessor drivers. This line of questioning was also found objectionable.

Mr. Keebler also testified that Steve Eva, now employed with S-B, had worked for Big Z, Inc. Mr. Keebler claimed Mr. Eva was a bad employee, driving for two companies at the same time. He was put on probationary status for "other problems" when Big Z learned that he was driving for S-B leasing.

Under cross-examination, Mr. Keebler testified that Big Z has used S-B's equipment under lease agreement, but that this decision was made by the dispatcher. He further testified that he contacted S-B about Mr. Eva. Because of "slander" concerns, he only stated that Mr. Eva left under suspicious circumstances and should be watched closely for "something to be suspicious" about.

Under further redirect, Mr. Keebler testified that he had the opportunity to physically inspect H.F. Johnson's equipment in "early, early" January, 1990 with the intent to get an estimate of the value. The Commission sustained Applicants' objection to this line of testimony, since Mr. Keebler had not established expertise on trucking or knowledge of the condition of the equipment while under the control of Applicants.

Summary of Offers of Proof

Protestant's attorney made three offers of proof on testimony for which objections were sustained as follows.

- a. As to the relevancy of the age of S-B's equipment to the issue of fitness, counsel would have offered through testimony that the equipment was extremely old and made its condition suspect, in the opinion of the Protestant.

- b. As to the repair or maintenance records of S-B, Applicant would have testified that given the age of the equipment a \$40,000 repair expense was not sufficient for five months, in the opinion of Protestant. Big Z spent \$80,000 on repairs to newer equipment before starting the season in the spring.
- c. Finally, as to the alleged extensive use of lessor operators to haul the trailers, Protestant's testimony would have been that heavy lease use causes numerous problems regarding long-term fitness, which is the reason Big Z uses its own trucks for the most part.

In the opinion of the Protestant, the offered evidence would have shown bearing on fitness.

DISCUSSION, ANALYSIS AND FINDINGS

Section 69-12-325, MCA, provides that a motor carrier certificate may be "sold, assigned, leased, transferred and inherited as property only by the authorization of the Commission."

Public convenience and necessity has already been established for existing certificates. Therefore, the only issue in applications for transfer is the fitness of the proposed transferee to operate as a motor carrier.

The Commission finds that S-B Transportation, Inc. is fit to possess a Certificate of Public Convenience and Necessity. S-B has been operating under a lease with H.F. Johnson, Inc. pursuant to terms satisfactory to the bankruptcy trustee since March 23, 1990. Without incurring debt, S-B has repaired equipment as necessary and kept equipment on the road which has passed

all state inspections, according to unrefuted testimony. S-B is in a financial position to acquire additional equipment or to lease equipment to meet the public convenience and necessity.

The financial information and testimony indicates that the proposed transferee S-B Transportation, Inc. has more assets than liabilities and is adequately capitalized. While paying its own employees, compensating its lease drivers about \$481,414.04 by lease agreement, repairing equipment and paying its other expenses, S-B Transportation, Inc. had net income of \$44,417.75 for a five month period. S-B was able and fit to meet the needs of the public according to its authority, and has the evident capability to do so for the future.

Once the issue of duplicating authority was resolved, Hornoi withdrew its protest and did not challenge the fitness of S-B. Big Z, Inc. alone remained to protest S-B's fitness in one docket as to the one authority to haul petroleum products. Big Z's testimony, including the offered testimony which was overruled, was directed to establishing Big Z's alleged superior fitness to have this authority. The following is not relevant to the fitness of S-B: Big Z's methods of operation; its approach to marketing; its ownership of a newer fleet; its alleged choice not to rely heavily upon leased equipment; its reliance upon expensive outside repair and maintenance on its fleet.

Fitness of the equipment of S-B Transportation, Inc. was established by the Applicant. Big Z's witness had no personal knowledge of S-B's equipment, aside from a visit in "early, early January" 1990 before it was acquired and repaired by S-B. Despite his college degree in engineering and his experience in sales, Mr. Keebler did not establish his credentials to inspect in January. According to his own testimony, he has scarcely been behind the wheel of a truck. He does not personally engage in maintenance of equipment. His allegation that Big Z spends more on

maintenance and therefore is more fit has no foundation, even if it were relevant. The Commission could conclude, given Mr. Keebler's testimony, that Big Z does not have the in-house capability to do maintenance and therefore spends more to send out its equipment. Regardless of such an inference, this testimony does not relate to the fitness of S-B. Big Z failed to refute S-B's testimony that its equipment had passed routine state inspections and was complying with Department of Transportation requirements.

Big Z, Inc. also appeared to question the fitness of S-B by comparing the educational backgrounds of Mr. Keebler to the principals of S-B. Mr. Sorlie is contributing his 15 years of experience in trucking to the corporation, apparently a satisfactory contribution to the other principal. One does not need a degree in engineering or marketing to own and run a trucking outfit, as many successful trucking companies could attest in Montana. Both the principals of S-B have experience in trucking and in "marketing." The Commission finds the evidence satisfactory that the management is fit to run S-B Transportation, as it has been doing so successfully. S-B has been advertising in major markets in Montana and has shown its fitness to meet the public convenience and necessity.

Big Z's challenge of S-B's use of leased equipment as an element of fitness also fails. Leasing equipment is legal in Montana and covered by statute, rules and regulations. See § 69-12-611, MCA, and ARM 38.3.2001 et seq. Many trucking outfits in Montana rely upon the use of leased equipment. In fact, Big Z has had to use leased equipment, including equipment of S-B Transportation, according to Big Z's testimony.

The Commission is concerned about fitness of motor carriers in Montana. The Commission will hold a hearing on fitness when any concerns of the Protestant(s) remain

unresolved. Once applicants for a transfer of authority have met their burden of proof of fitness, the burden shifts to the protestant to refute applicants' evidence on fitness. As previously stated, Protestant Big Z, Inc. has not satisfactorily rebutted the evidence of transferee's fitness. Therefore, the Commission grants the application to transfer the authority of PSC No. 1364 and Subs A and B to S-B Transportation, Inc.

Pursuant to agreement and consent of parties, the motion to amend the transfer application in Docket No. T-9560 is granted. The Class B portion of authority related to petroleum products in Glacier and Cascade counties is returned to the trustee of the bankruptcy estate of Rocky Mountain Feed Ingredients, Inc.

Upon consent and agreement of parties, the Commission further grants the motion of transferor H.F. Johnson, Inc. to withdraw the application for transfer of the Sub C Class B authority for liquified petroleum gas between Billings and points and places in Montana. This authority shall remain in bankruptcy estate of H.F. Johnson, Inc. until its further decision on disposition.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding, pursuant to Title 69, Chapter 12, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. A Certificate of Public Convenience and Necessity may be sold or otherwise transferred only by authorization of the Public Service Commission.

4. The relevant consideration in the transfer of a Certificate of Public Convenience and Necessity is whether the new carrier is fit to operate as a motor carrier in the state of Montana.

5. S-B Transportation, Inc. is a fit motor carrier and the transfer of PSC No. 1364, Subs A and B is in the public interest.

ORDER

NOW THEREFORE IT IS ORDERED that the application to transfer PSC No. 1364, Subs A and B in Docket No. T-9559 is granted.

IT IS FURTHER ORDERED that the application to transfer PSC No. 1364, Sub C only in Docket No. T-9558 is withdrawn.

IT IS FURTHER ORDERED that the application to transfer PSC No. 3353 in Docket No. T-9560 is amended to return the Class B portion of authority to transferor Rocky Mountain Feed Ingredients Service, Inc., described as follows:

CLASS B - Petroleum products, to all points
in Montana, within a radius of 350 miles of the point
of origin at the refineries in Glacier and Cascade
Counties.

The remainder of the application for transfer of PSC No. 3353, Sub A, Class B authority to haul beet molasses and Sub A, Class C authority to haul liquid animal feed is granted as requested.

IT IS FURTHER ORDERED that the Applicants must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

Done and Dated this 19th day of November, 1990 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

REX MANUEL, Commissioner

JOHN B. DRISCOLL, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.